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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1009

HANNAHVILLE INDIAN COMMUNITY, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

ROBERT C. BELL, JR.
One East 44th Street
New York, New York 10017
Attorney for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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These petitioners were intervenors in the United States Court of Claims. They are eastern Potawatomi groups numbering over 3,000 persons known as the Hannahville Indian Community, the Forest County Potawatomi Community, The Potawatomi Indians of Indiana and Michigan, Incorporated, and numerous individuals. Their motion for reconsideration was denied by the Court of Claims on October 13, 1967. We do not repeat here the opinion of the Court of Claims dated April 14, 1967 and portions of the opinion of the Indian Claims Commission and the Indian Claims Com-

mission Act. These are printed in the Appendix to the Petition for a Writ of Certiorari filed October 18, 1967 by the Citizen Band of Potawatomi Indians of Oklahoma, et al., and the Prairie Band of the Potawatomi Nation of Indians.

QUESTIONS PRESENTED

1. Should Indian owners be compensated for mineral deposits known to be on their property when taken by the United States?

2. May the United States claim any benefit from reservations it claims the President had a right to reserve or select from Indian lands when the President or his agent never made any such reservations or selections?

3. May a court rewrite a treaty as distinguished from merely interpreting or construing it?

4. May the United States take Indian lands for no consideration or an unconscionably small consideration?

STATEMENT OF THE CASE

This petition relates to 3,528,949 acres of land in northwestern Illinois and southwestern Wisconsin, which had belonged to ancestors of present day Indian groups who had owned and occupied the said lands from time immemorial. The claimed value of the land as of the date of taking (1829) is $2.00 an acre ($7,057,898) plus mineral rights of a value of $2,623,312, a total claim of $9,681,210.

The Indians' title to this land was recognized by the United States on numerous occasions including six treaties:

Treaty of August 3, 1795 at Greeneville, Ohio, (7 Stat. 49) (see Article IV)

Treaty of July 18, 1815 at Portage des Sioux, Illinois, (7 Stat. 124) (see Article 4)

Treaty of August 24, 1816 at St. Louis, Missouri, (7 Stat. 146) (see Articles 2 and 3)

Treaty of August 19, 1825 at Prairie des Chiens, Wisconsin, (7 Stat. 272) (see Articles 9 and 10)

Treaty of August 25, 1828 at Green Bay, Wisconsin, (7 Stat. 315) (see preamble "for the purpose of extinguishing their title to . . . the lead mines on Fever River, and in the vicinity of said lead mines. . ." (and Article 2) "twenty thousand dollars. . . . in full compensation for all the injuries and damages sustained by them, in consequence of the occupation of any part of the mining country by white persons, . . ."

Treaty of July 29, 1829 at Prairie du Chien, Wisconsin, (7 Stat. 320) (see Article I)

"Immensely valuable lead mines" were taken by the United States for little or no consideration under the pretext that this taking was permitted by a clause in the Treaty of 1816 at St. Louis (7 Stat. 146). This treaty clearly stipulated, recognized and provided that the lands in question were Indian lands, but in unambiguous words it also provided that the great white father, the President of the United States could make certain reservations as he "might think proper to reserve: *Provided*, That such other tracts shall not in the whole exceed the quantity that would be contained in five leagues square" (which is to say 15 miles square, or 225 square miles, or 144,000 acres). No reference is made to "lead lands" as such.

Government records show that the Treaty Commissioners exceeded their authority in negotiating such a treaty provision. In their report to the Secretary of War the Commissioners concede that, "we do not think the amount of goods which we have contracted to give them, a sufficient equivalent for the relinquishment and cession which we have obtained from them; but by contracting to give them no more, we have left room for the Government to exceed its obligations, and thereby to produce infinitely more favourable impressions upon the minds of those people."

In any event these selections or reservations were never made by the President of the United States. Prospectors nonetheless swarmed into this area which contained some of the best lead mines then known in the world. Many of these had been worked by the Indians from the dawn of history to provide their own bullets and trade goods. The prospectors selected for themselves scattered mining sites, staked out claims, obtained leases from U.S. army officers for a 10% royalty to the United States and processed their ore at U.S. licensed smelters. The mining boom in the Galena, Illinois, area became world reknowned. It profited the United States greatly, progressed the rapid settlement of the area, and effectively deprived the Indians of their use of their land and its minerals.

The government action was vigorously protested at length on May 3, 1822 in a speech on the floor of the U.S. Senate by Senator Thomas Hart Benton, of Missouri, who "showed a table of the Indian trade at St. Louis in 1816, which exhibited the quantity of 180,000 pounds weight of lead sold by the Indians from these mines, to the fur traders. . ."

The situation was also protested in August 1827 in a joint letter to the Secretary of War by two case hardened Indian experts, Hon. Thomas L. McKenny, head of the Office of Indian Affairs, and Hon. Lewis Cass (treaty negotiator, Governor, Senator, Secretary of War, and State, and U.S. presidential nominee). In a special treaty on August 28, 1828, Lewis Cass gave the Indians $20,000 in "full compensation for all the injuries and damages sustained by them, in consequence of the occupation of any part of the mining country by white persons. . ." and the preamble of said treaty recognized "their title to. . . . the Lead mines on Fever River, and in the vicinity of said Lead Mines. . . ."

The Indians ultimately ceded the entire area (Royce 147-148) for a consideration totalling $364,901 which the Indian Claims Commission found (11 Ind. Cl. Comm. 693) to be:

> "so grossly inadequate an amount for 3,528,949 acres of the subject land having a fair market value of $2,470,263.30 or an average price of $0.70 per acre as to make the consideration unconscionable."

This award included nothing for mineral lands which were arbitrarily held to fall within the "five leagues square" irrespective of where said mineral lands might be. As a consequence, the Indians received no considerations for this valuable property in the 1816 treaty, or in the 1829 treaty, or at any other time.

The Indians knew that they had not received "fair and honorable" treatment, but the sovereign cannot be sued without its consent. Many Indians with many grievances have flooded Congress for years with memorials asking for jurisdictional acts to get into the Court of Claims. Finally when the United States was preparing to become a member of the United Nations in 1946, it determined to look to its own treaty position vis-a-vis the Indian tribes and passed an omnibus jurisdictional act, the Indian Claims Commission Act (60 Stat. 1049, as amended, 25 U.S.C. 70 et seq.). This law permitted additional compensation to be given for Indian lands taken for an "unconscionable consideration". The measure of damage was the value at the time taken less the consideration paid by the United States. There could be no allowance for interest, or improvements, or depreciation in the value of money. Twenty-one dilatory years after the passage of the Indian Claims Commission Act, this particular matter is still unsettled.

The U.S. Court of Claims, in its decision in Appeal No. 6-65, dated April 14, 1967 said (Pet. App. 12a):

> "We think Lewis Cass, then Governor of the Michigan territory, and Thomas L. McKenny, head of the Office of Indian Affairs, in their letter to Secretary of War Barbour in 1827, correctly expressed the interpretation to be given to the 144,000 acre reservation: '[C]ertainly, nothing can be more incorrect

than a construction which gives the right of location in tracts of one or two hundred acres over the whole country * * * and considering the reservation of fifteen miles square complete, when the quantity located equals that extent. *It would render the whole country utterly useless to the Indians*, and the exercise of separate jurisdiction over these people and ours would be impracticable. All the provisions of the laws, regulating trade with them, would be inefficient; and, in fact, *the principles of our Indian policy must be wholly abandoned, if this construction* [that supplied by Lt. Thomas] *prevails.*" (Emphasis supplied)

In its mandate or order, however, the Court of Claims said (Pet. App. p. 20a-21a):

> "We have also found that the Commission was correct in finding that the reservation of a maximum of 144,000 acres out of the area ceded to the United Nation in 1816 did not have to be exercised in order to be valid, but, the Commission erred in finding that the President could pick and choose mineral lands, whenever and wherever located, so as to have such acreage include all the lead lands within Area 147, up to the specified maximum. Accordingly, the Commission should find what number of acres within Area 147 had actually been selected by the United States as of July 29, 1829 (through the town-site reservation and the granting of mining leases and permits) and should subtract the fair market value thereof from the fair market value of Area 147 as a whole. . . . The United States must bear the consequences of the improper and dilatory way it went about the selection. Our method, however, does allow it the benefit of its actual selections, even though not properly made."

The opinion of the Court of Claims is thus in fact inconsistent on its face. It embraces the Cass-McKenny interpretation that the 144,000 acre reservations cannot be scattered, but then permits scattered sites. It allows prospectors' "actual selections, even though not properly made".

Although the Treaty of 1816 required Presidential selection or reservation, the Court of Claims states, "the Commission was correct in finding that the reservation . . . . did not have to be exercised in order to be valid. . ." The Court of Claims thereby undertakes to do what a court historically, judicially and legally cannot do. It undertakes to rewrite a treaty, instead of interpreting or construing it.

The position of the Court of Claims is clearly contrary to the opinion of the U.S. Supreme Court in *New York Indians v. U.S.*, (1898), 170 U.S. 1, 25, which says:

> "the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands and sell them. . . . As there is no pretense that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the Government."

And likewise at 170 U.S. 23:

> "There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement."

Indians usually knew what settlers were paying the government for their lands in the early 1800s, and they knew what their lands were worth, but they were nonetheless generally parted from them by subterfuge and/or intimidation. The Indians were forbidden by law to sell lands to anyone but

the United States Government, and never did a guardian profit so greatly from dealing with a ward. Next to tariff revenues the proceeds of Indian lands were usually the largest source of federal income until the enactment of the federal income tax. These proceeds paid for most of our early wars and much of our national development. The brutal and pestilential trek to the West known to students of Indian history as the "Trail of Death" is a fact of life to many of the petitioners from their own parents first hand accounts. The monetary issues in this case are minuscule in our trillion dollar economy, towards which these people have contributed greatly. The measure of damages is reasonable and the hour is late, but the time is now to make amends to these grievously offended people. Circumstances warrant some deliberate speed and a departure from the traditional Department of Justice policy of delay in such cases.

CONCLUSION

It is respectfully submitted that (a) the issues here involved, and (b) the entire dilatory Indian claims process and (c) the good faith of the United States, in fact, are fraught with great public interest and significance. They require the interference in this case, the attention, and the supervision of this honorable court. Writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. BELL, JR.
One East 44th Street
New York, New York 10017

Attorney for Petitioners
Hannahville Indian Community,
Forest County Potawatomi Community,
The Potawatomi Indians of Indiana and Michigan, Incorporated,
Michael B. Williams, John R. Winchester, John Topash, R. C. Mix, Albert N. Mackety, Valentine Ritchie, Ike George, Frank Wandahsega, Elija Petonquest, et al.

IN THE UNITED STATES COURT OF CLAIMS

* * *

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges, except that REED, Justice (Ret.), sitting by designation, participated in App. 6-65 in place of DAVIS, Judge.

ORDER

These cases come before the court on motions for reconsideration, order vacating dismissal, rehearing, relief from order, and for further relief under Rules 68 and 69 of the Rules of this court, and on consideration thereof,

IT IS ORDERED this 13th day of October 1967, that said motions be and the same are denied as follows:

* * *

BY THE COURT

Wilson Cowen
Chief Judge